SILVERMAN, Circuit Judge, concurring:

I fully concur in the portion of the Memorandum affirming the judgment in favor of Federal Express on the excess charges claim. As for the judgment in favor of the plaintiffs on their claim that FedEx breached its money back guarantee, I agree that reversal is required but, respectfully, for a different reason. As I see it, the press release issued on July 31, 1997 plainly amended the Service Guide.

The Service Guide provided for a money-back guarantee for late delivery. It also stated how FedEx could amend the Service Guide:

> FedEx reserves the right, and only by authorization of its Senior Vice President of Marketing and Corporate Communications or successor positions, unilaterally, and from time to time, in writing, to modify, amend or supplement the rates, features of service and Service Conditions in this Service Guide applicable to all customers without notice, but no other agent or employee of FedEx, nor any other person or party, is authorized to do so.

The press release of July 31, 1997 made specific reference to the Service Guide and clearly stated that money-back guarantees would not be offered until further notice. The press release was (1) in writing and (2) authorized by FedEx's Senior Vice President of Marketing and Corporate Communications, the official

designated in the Service Guide to be the only FedEx person empowered to amend the Service Guide. By the terms of the Service Guide itself, a *writing* authorized by the *designated official* were the only two prerequisites to amending the Service Guide. FedEx did not have to say "Simon says" or "Mother, may I." Perhaps the press release could have been written better or with more legalese. Regardless, no reasonable person could have been left with any doubt whatsoever that FedEx was suspending the money-back guarantee until further notice. Indeed, in invoking the futility doctrine as a defense to their failure to submit a notice of claim, the plaintiffs themselves freely admit that FedEx's suspension of the money-back guarantee was "widely publicized."

Nor is an authorized writing disqualified as an amendment just because it has been widely disseminated or released to the press. If anything, the law should encourage wide dissemination of unilateral modifications to contracts such as those involved here, lest customers be misled.

It is true that eight days after the press release, FedEx's Senior Vice President of Marketing and Corporate Communications, T. Michael Glenn, promulgated a more formal amendment to the Service Guide. This does not mean that the July 31 writing did not amend the Service Guide. The August 8 writing was simply the formal documentation of the less formal but written action taken

by Glenn on July 31. The formal amendment issued by Glenn on August 8 specifically purports to be "effective July 31, 1997" and to be "pursuant to my previous written approval."

It is not at all unusual for parties to make legally binding commitments, the formal documentation of which follows in due course. One example is an insurance agent's binder, which is effective immediately to provide coverage even though the formal insurance policy does not issue until much later. Another example is an oral stipulation made in open court to settle a lawsuit on certain terms, which is eventually followed by a formal settlement agreement containing those terms plus the customary settlement boilerplate. This is a commonplace occurrence.

Because FedEx effectively amended its Service Guide on July 31, 1997 to suspend the money-back guarantee until further notice, it did not breach its contract by failing to honor the guarantee after that date. It is for that reason that I would reverse the district court's judgment in favor of the plaintiffs.